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In the Supreme Court of the United States

OCTOBER TERM, 2001

Chris Woodall and Columbia River Gorge Commission,

Petitioners,

v.

Skamania County,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Washington

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BRIEF OF THE STATE OF OREGON AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Congress authorized the States of Oregon and Washington to enter into an interstate compact to develop uniform land use planning standards in the Columbia River Gorge National Scenic Area to protect the area's scenic, cultural, natural, and recreational resources, and to promote growth to occur in existing urban areas. The Columbia River Gorge Commission is the interstate compact agency created by Oregon and Washington. Congress and the States require the Commission to develop uniform standards, approve county ordinances as consistent with the standards and hear appeals concerning counties' application of their ordinances. The Washington Court of Appeals, however, determined that the Gorge Commission, in its appellate role of reviewing local land use decisions for compliance with county ordinances, must interpret those ordinances in a manner consistent with Washington's law, rather than with the Gorge Commission's own standards. The question presented is therefore:

Under an interstate compact that does not reserve the states' individual land use standards, is the compact agency entitled to interpret local ordinances implementing the Commission's standards in a uniform manner to achieve the purposes of the Compact, even if that interpretation conflicts with state law?

This is an issue of first impression for this Court; in 1997, this Court denied the Delaware River and Bay Authority's petition for a writ of *certiorari* presenting a substantially similar issue.

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INTEREST OF THE STATE OF OREGON

Over the passage of millennia, the Columbia River carved through the Cascade Mountains a spectacular canyon worthy of ongoing national protection. This majestic waterway also serves as the political boundary between the States of Washington and Oregon. That simple geopolitical fact not only has complicated the long and arduous process of achieving consensus between Congress and the two states on how best to protect the Gorge, but it also has necessitated the creation of an interstate commission to ensure the uniform stewardship of land within the Columbia River Gorge National Scenic Area. It is the carefully forged legal balance reflected in the Columbia River Gorge Compact that the decision of a single state court now threatens.

Resolution of the question presented by petitioners Chris Woodall and Columbia River Gorge Commission is vital for the future resolution of land use disputes that will arise in the Columbia River Gorge National Scenic Area. Because the state land use laws of Oregon and Washington differ significantly, the Washington Court of Appeals' decision virtually ensures that land will not be developed in a consistent manner on both sides of the river.

Whether the Columbia River Gorge Commission may interpret terms in county ordinances in a manner that achieves consistency with the National Scenic Area's Management Plan is of great importance to Oregon. When citizens of Oregon and tourists who flock to Oregon look across the Columbia River from the Oregon side, they should not perceive a landscape differing radically from that seen by those looking from the Washington side.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Columbia River Gorge National Scenic Area is a treasure that belongs to the entire nation, although situated between the States of Oregon and Washington. The Columbia River Gorge embraces within the National Scenic Area breathtaking vistas, monumental geology, spectacular waterfalls, diverse wildlife and habitat, forests and farmland. The Columbia River is a major conduit of commerce in the Pacific Northwest, and the National Scenic Area is itself a stunning segment of that conduit. It is a unique resource worthy of ongoing protection under the interstate compact that Congress authorized and the States of Oregon and Washington adopted.

Under the provisions of the Columbia River Gorge Compact, the Columbia River Gorge Commission is the steward of the National Scenic Area. The Gorge Commission is vested with the authority and the duty to ensure that land use planning within the area is uniformly coordinated. The Gorge Commission does so by disapproving county ordinances that are not consistent with its National Scenic Area Management Plan. And when it reviews county determinations applying county ordinances, the Gorge Commission may interpret the ordinances to achieve consistency with the Management Plan to protect the Gorge, even if that would differ from the interpretation that state courts would reach by applying their own state's common law.

The Washington Court of Appeals reached a contrary conclusion in deciding that the Gorge Commission must interpret county ordinances by applying Washington's common law instead of uniformly applying the Management Plan. The Washington Court of Appeals' decision in this case will inevitably unravel the uniformity of management under the stewardship of the Columbia River Gorge Commission.

Short of this Court's intervention, Washington state courts will pursue their own interpretation of the Gorge Commission's authority concerning county ordinances on the Washington side of the river. Were Oregon courts to follow suit, they would pursue their own interpretation of county ordinances on the Oregon side. Even if Oregon courts agreed with the Gorge Commission that county ordinances must be interpreted to be consistent with the Management Plan, the result would be non-uniformity of land use planning in the Columbia River Gorge area. That is the antithesis of what Congress, Washington and Oregon intended in creating the Columbia River Gorge Commission as the steward for the National Scenic Area.

Only this Court can now resolve the question of the authority of the Columbia River Gorge Commission in a manner that will be binding on both Washington and Oregon courts. Under the provisions of the National Scenic Area Act and the Gorge Compact, this underlying land use dispute could arise only in state courts, not federal district courts. If Oregon and Washington were forced to litigate the issue between them directly, this Court would have original and exclusive jurisdiction. But this Court need not wait until one state sues the other. It can and should resolve the matter now by granting *certiorari* in the case at hand.

ARGUMENT

I. The Columbia River Gorge is a unique, national treasure worthy of ongoing protection.

The Columbia River is the largest river in the country flowing into the Pacific Ocean. It passes virtually at sea level through the second biggest mountain range in the United States outside of Alaska. 132 CONG. Rec. 32,214 (1986).

The Columbia River Gorge was formed two million years ago, when the Cascade Mountain range erupted and huge ice dams broke, sending floods westward. *See* Tolan and Beeson, *Exploring the Noegene history of the Columbia River: Discussion and Geologic Field Trip Guide to the Columbia River Gorge*, 46 OR. GEOLOGY 95 (1984). The resulting gorge is nearly one mile deep.

In 1806, Captain Meriweather Lewis described with awe the monumental rock formations and scenic beauty of the area he explored in his famous expedition with William Clark through the Columbia River Gorge:

> on our way to this village we passed several beautifull cascades which fell from a great hight over the stupendious rocks which closes the river on both sides nearly, except a small bottom on the South side in which our hunters were encamped. the most remarkable of these casscades falls about 300 feet perpendicularly over a solid rock into a narrow bottom of the river on the south side. it is a large creek, situated about 5 miles above our encampment of the last evening. several small streams fall from a much greater hight, and in their decent become a perfect mist which collecting on the rocks below again become visible and decend a second time in the same manner before they reach the base of the rocks.
>
> the mountains through which the river passes nearly to Cataract River are high broken rocky, particularly covered with fir and white cedar, and in maney places very romantic seenes. Some handsom cascades are seen on either hand tumbling from the stupendious rocks of the mountains into the river.

ORIGINAL JOURNALS OF THE LEWIS AND CLARK EXPEDITION 1804–1806, Volume 4, Part II, April 9 & 14, 1806, pp. 259–60 and 281 (Dodd 1905) (original spelling).

The river the explorers traveled down now marks the boundary between Washington and Oregon. It is important to those two states not only for historic reasons but also as a conduit of commerce and as the site of fisheries, agriculture and forestry. As Senator Mark Hatfield said when the Columbia River Gorge National Scenic Area Act was being debated in Congress:

> [The Columbia River Gorge] is the location of some of the most wondrous scenic vistas in North America as well as the home of over 44,000 people. The hundreds of millions of dollars worth of commercial activity which occurs there has contributed to the area's attractive livability. Unfortunately, the Columbia [River] Gorge is also a bull's-eye for some who would develop it in a way that would destroy forever the very qualities which make the gorge a supremely special place in a land blessed with abundant, but ever-threatened natural wonders.

132 CONG. REC. 29,496 (1986).

The Columbia River and its tributaries support substantial fisheries at all times of the years. *Draft Management Plan*, Columbia River Gorge National Scenic Area, U.S. Department of Agriculture, Forest Service (1990) (hereinafter U.S.F.S.) at 32. Agricultural land lies mostly in the eastern end of the Columbia River Gorge area, where soils are good, abundant water is available and prime orchard lands are located. *Id.* at 40. Large tracts of forestland are found in the western area. *Id.* at 46–48.

The Gorge is a highly celebrated tourist attraction dating back to the 19th century. John Muir wrote in 1888:

> [T]he great river of Oregon draws crowds of visitors, and is never without enthusiastic admirers to sound its praises. Every summer since the completion of the first overland railroad, tourists have been coming to it in ever increasing numbers, showing that in estimation the Columbia is one of the chief attractions of the Pacific Coast, and well deserves the admiration so heartily bestowed upon it. The beauty and majesty of its waters and the variety and grandeur of the scenery through which it flows, lead many to regard it as the most interesting of all the great rivers of the continent * * *.

BASIN OF THE COLUMBIA RIVER 407 (Dewing 1888).

The sense of drama generated by the Columbia River Gorge is immortalized in the first verse of "Roll On, Columbia!," written by Woodie Guthrie in 1949 and designated by the State of Washington in 1987 as its official folk song:[1]

> Green Douglas firs where the waters cut through,
> Down her wild mountains and canyons she flew.
> Canadian Northwest to the ocean so blue,
> It's roll on, Columbia, roll on!

And the Columbia River Gorge National Scenic Area is truly a national treasure that attracts visitors from all over. Multnomah Falls, 620 feet high, is the second-highest year-round waterfall in the country. It is also Oregon's most-visited

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[1] *See* State of Washington, *The Symbols of Washington State, at* http://www.leg.wa.gov/legis/symbols/symbols.htm.

tourist site. Petty, *Even in wet winters the Columbia River Gorge is enchanting*, Associated Press, January 17, 2002, *in* http://www.enn.com/news/wire-stories/2002/01/-0172002/ap_46134.asp. As noted in that recent Associated Press news article, "Many visitors view the gorge's wonders by driving along the Historic Columbia River Highway, a two-lane road that snakes past waterfalls, over hillsides, and to the tops of 900-foot cliffs. The road was designed in 1913 specifically to spotlight the gorge's scenery."

The Columbia River Gorge contains myriad other valuable resources. The geology of the Gorge has created a diversity of habitat for vegetation and wildlife. The Gorge contains rare as well as wild and endangered animal species, including the pine marten and western gray squirrel. Blair, *The Columbia River Gorge National Scenic Area: The Act, Its Genesis And Legislative History*, 17 ENVT'L L. REV. 863, 870 (1987). In addition, falcons, bald and golden eagles, swans and great blue heron soar over the promontories of this magnificent habitat. Blair, 870. Over 800 species of wildflower, some of which are endangered, others of which are found nowhere else, bloom in colorful abundance. 132 CONG. REC. 32,218 (1986); U.S.F.S., 33; Blair, 869. Vast forests at the western end of the Gorge are juxtaposed against golden, wheat colored hills rising in the east. 132 CONG. REC. 32,218 (1986).

Significant cultural resources are also found along both sides of the Columbia River. 132 CONG. REC. 32,222 (1986). Over four hundred recorded, prehistoric archaeological sites document human occupations from centuries past and attest to the area's importance to Native Americans who have inhabited the area for anywhere from 10,000 to 20,000 years. Minor, *A Resource Protection Planning Process Identification of Prehistoric Archaeological Resources in the Lower Columbia*

Study Unit (1986), p. 14; Blair, 870. Of those sites, slightly over half are on private, county, state and federal lands other than those administered by the National Forest Service. Native Americans continue to maintain their cultural identity within the Gorge. U.S.F.S., 30. Commercial, subsistence and ceremonial fishing is a right reserved by the tribes under the treaties of 1855. *Id.*; 132 CONG. REC. 32,222 (1986).

Given the multiple valuable resources found within the Columbia River Gorge, there can be no doubt that it is a unique treasure that belongs neither solely to the State of Oregon nor to the State of Washington, but to the entire nation. It is eminently worthy of ongoing protection.

II. The Columbia River Gorge Commission is the steward of the National Scenic Area vested with authority to ensure that land management is uniformly coordinated.

Efforts to bring regional planning to the Columbia River Gorge date back to 1893, when Congress created the Cascade Range Forest Reserve, which later became the Mount Hood National Forest. U.S.F.S. at 3.

Past efforts to manage the Gorge's resources through merely advisory bodies have failed. Bowen Blair, Jr., *The Columbia River Gorge National Scenic Area Act: The Act, Its Genesis and Legislative History*, 17 Envt'l. L. 863, 878–79 (1987). In the 1950s, each state formed its own gorge commission. The two bodies eventually shared staff and an office and sought to cooperate as much as possible under their separate enabling legislation. Nonetheless, as early as 1970, the Governors of the two states and the two gorge commissions themselves were advocating an alternative model based on enforcing a *single* management plan for the Gorge. *Id.* at 879. A key document during the congressional debate over the cur-

rent Act was a joint position paper developed by the two gorge commissions. It stated that the legislation "must recognize the need for a *single management structure* capable of ensuring the protection of the region's unique values by melding local, state and national interests." Oregon and Washington Columbia River Gorge Commissions, Position Paper on Gorge Legislation (Feb. 1986) (emphasis added).

After years of tentative efforts, a consensus developed in support of protecting the Columbia River Gorge by creating an interstate agency with authority to manage the natural resources on both sides of the river. 16 U.S.C. § 544 *et seq.* (1986). 132 CONG. REC. 32,192–93 (1986). Congress approved the Columbia River Gorge National Scenic Area Act on October 17, 1986, and President Reagan signed it on November 17, 1986.

Congress specified that the purpose of the Columbia River Gorge National Scenic Area Act is two-fold. First, the Act establishes a National Scenic Area to protect and provide for the enhancement of the scenic, cultural, recreational, natural resources of the Columbia River Gorge. Second, the Act protects and supports the economy of the National Scenic Area by encouraging growth to occur in existing urban areas and by allowing future economic development consistent with the first purpose. 16 U.S.C. § 544a.

The Act designates a portion of the Columbia River Gorge as a National Scenic Area, divided into three categories: (1) urban areas that the Act exempts from regulation; (2) special management areas that are placed under the jurisdiction of the Secretary of Agriculture; and (3) other lands that the Act

subjects to the jurisdiction of the Columbia River Gorge Commission. 16 U.S.C. § 544b.[2]

The Act contains the advance consent of Congress to a compact between Oregon and Washington, and the two states were authorized to create an interstate agency, the Columbia River Gorge Commission, with regulatory responsibility for the natural resources within the National Scenic Area. 16 U.S.C. § 544c; *see also* U.S. CONST., art. I, § 10, cl. 3 (Compact Clause). As a condition to its consent, Congress has required that the Gorge Commission carry out its powers and duties in accordance with prescribed standards in the Act and that Washington and Oregon vest in the agency the authority necessary to carry out the purposes of the Act. 16 U.S.C. § 544c.

The Act confers on Washington and Oregon authority to establish the Columbia River Gorge Commission, composed of six members appointed by the Governors and six members by the counties. 16 U.S.C. § 544c. The Act requires the Columbia River Gorge Commission to make land use designations based on a series of studies. 16 U.S.C. § 544d. The Act directs the Commission to designate land used or suitable for agriculture, forests, open space, commercial development and residential development. 16 U.S.C. § 544d(b). The Act requires the Commission to adopt a Management Plan for the National Scenic Area based on standards contained in the Act. 16 U.S.C. § 544d(c), (d).

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[2] The National Scenic Area straddles the Columbia River and is about 85 miles long and ten miles wide. Lynch, *Trailer court case could alter political scenery in gorge*, THE OREGONIAN (February 24, 2002). The urban areas include 13,000 acres, the special management areas 112,000 acres, and the remaining areas 113,000 acres. 99 CONG. REC. H 10485 (Oct. 16, 1986).

For purposes of this case, one of the most important provisions of the Act is that each county is required to adopt land use ordinances consistent with the Columbia River Gorge Commission's Management Plan. 16 U.S.C. § 544e. The Gorge Commission must approve all county ordinances affecting non-federal lands within the National Scenic Area as being consistent with the Management Plan. 16 U.S.C. § 544e.

In authorizing the Gorge Compact on the foregoing terms, Congress mandated, and both Oregon and Washington agreed, that each state would relinquish its hegemony *vis-à-vis* land use planning and regulation in the National Scenic Area. Congress thus mandated a regional approach coordinated under the Gorge Commission's Management Plan, which the states necessarily agreed to in adopting the Compact.

III. The Washington Court of Appeals' decision will unravel the uniformity of management under the stewardship of the Columbia River Gorge Commission.

A. The Columbia River Gorge Commission necessarily has the authority to require Skamania County to apply its ordinance in a manner that makes it consistent with the Management Plan.

There is no dispute in this case that Congress, Oregon and Washington established the Columbia River Gorge Commission and gave it significant management and oversight responsibilities concerning land use planning within the National Scenic Area. Nor is there any question but that in reviewing county ordinances for consistency with the Management Plan, the Gorge Commission has the authority to require county ordinances to comply with that plan. 16 U.S.C. § 344e.

The issue is whether the Gorge Commission can require that counties, in interpreting and applying their ordinances, must do so in a manner that is consistent with the National Scenic Area Management Plan.

In this case, the Skamania County Board of Adjustment determined that a ten-site trailer park was a use that had not been discontinued within the meaning of its ordinances governing non-conforming uses. The Board of Adjustment concluded that the term "discontinue," which is not defined in the county's ordinance, must be interpreted consistently with Washington common law. Because Washington common law requires that the owner must subjectively intend to abandon the use, and because no subjective intent had been shown, the Board ruled that the use had not been discontinued.

In reviewing the county's determination, the Gorge Commission, applying the National Scenic Area's Management Plan, reached a different conclusion. The Gorge Commission ruled, and the Skamania County Superior Court agreed, that a nonconforming use in the National Scenic Area is discontinued upon cessation of use for one year—an objective standard.

Had Skamania County proposed in its ordinance to define "discontinued use" as requiring the landowner's subjective intent to abandon the use, coupled with non-use in fact for a one-year period, the Gorge Commission clearly would have had the authority to require Skamania County to drop the subjective intent requirement. That is because such a requirement, although consistent with Washington law, would have been inconsistent with the Management Plan.

The question posed in this case is thus whether the Gorge Commission can require Skamania County to interpret its ambiguous ordinance in a manner that makes it consistent with

the Management Plan, even if that interpretation is not consistent with Washington's common law. The State of Oregon submits that the answer to that question is clearly "yes." Only a "yes" answer to that question ensures the uniformity of land management envisioned by Congress and the two states within the National Scenic Area.

The Washington Court of Appeals held, however, that Skamania County properly applied Washington state judicial interpretations of the meaning of "discontinued use," even though those interpretations conflict with the Gorge Commission's Management Plan. The State of Oregon does not believe that the Court of Appeals' holding can withstand scrutiny.

Under the terms of the Act, the Gorge Commission has the authority not only to disapprove county ordinances that are inconsistent with the Management Plan but also to reverse county land use decisions based on interpretations of county ordinances that are inconsistent with the Plan. Further, the Gorge Commission is not bound by state judicial decisions that might lead to a different interpretation.

Were it otherwise, regional land use planning within the Columbia River Gorge would unravel. Coordinated land use planning would be replaced by a series of conflicting state court decisions on land use matters that affect the integrity of this National Scenic Area. See discussion *post*.

The Gorge Commission in this case correctly reversed the Skamania County Board of Adjustment's approval of the nonconforming use. The Washington Court of Appeals, in exercising its limited judicial review authority under the Columbia River Gorge National Scenic Area Act, erred in reversing the Gorge Commission's decision.

B. The Washington Court of Appeals' decision will undermine uniformity of land use decisions in the National Scenic Area.

Congress recognized that the resources of the Columbia River Gorge were not previously being protected under the two states' different land use planning systems. 132 CONG. REC. 29,498 (statements of Senator Packwood (OR) and Senator Evans (WA)). Congress therefore created a new paradigm of land use management in the National Scenic Area by requiring a uniform set of land use standards applicable throughout the two-state, six-county region.

The Washington Court of Appeals' decision will inexorably undermine the uniformity of land use decisions in the National Scenic Area. The decision of the Washington Court of Appeals explicitly allows Washington common law to be applied only on the Washington side of the Columbia River. When Congress and the two states created the Gorge Commission as the steward of land use management within the National Scenic Area, they did not envision two different sets of land use laws, one on each side of the Columbia River,

The Washington Court of Appeals' decision will tend to produce exactly the outcome that Congress and both states rejected. That is, county ordinances will be interpreted differently, depending on which side of the Columbia River they apply. Neither state agreed to that result in adopting the Gorge Compact. Rather, both states agreed to give up their respective hegemonies *vis-à-vis* land use planning and regulation in the National Scenic Area, in favor of a regional approach coordinated under the Management Plan. Coordinated land use planning within the National Scenic Area requires that county ordinances must be approved and definitively interpreted by the Gorge Commission.

IV. This Court is the only court that can resolve the question of the authority of the Columbia River Gorge Commission to ensure uniformity of land use decisions within the National Scenic Area.

Only this Court can resolve the question of the authority of the Columbia River Gorge Commission in a manner that will be binding on both Washington and Oregon courts in this case. Short of this Court's intervention, Washington state courts will pursue their own interpretation of the Gorge Commission's authority concerning county ordinances on the Washington side of the Columbia River within the National Scenic Area. Oregon courts might pursue their own interpretations of county ordinances on the Oregon side within the National Scenic Area. Even if Oregon courts properly deferred to the Gorge Commission, the result would be non-uniformity. That is the antithesis of what Congress, Washington and Oregon intended in creating the Columbia River Gorge Commission as the steward of coordinated land management within the National Scenic Area.

Because the Gorge Compact itself provides that state courts have exclusive jurisdiction over appeals from Gorge Commission decisions, 16 U.S.C. § 544m (6), this type of land use dispute could not arise in the federal courts. Hence, unless one state were to sue the other, the issue presented here could arise only in this context, where a state court has applied state common law to interpret a county ordinance, rather than defer to the Gorge Commission's definitive interpretation of the ordinance.

If the meaning of the Gorge Compact were to arise in the context of litigation directly between the States of Oregon and Washington, this Court would have original and exclusive jurisdiction. U.S. CONST. art. III, § 2, cl. 2 ("In all cases * * * in which a state shall be Party, the Supreme Court shall have original jurisdiction"); 28 U.S.C. §1251(a) ("The Supreme

Court shall have original and exclusive jurisdiction of all controversies between two or more States").

The State of Oregon does not consider that the States of Oregon and Washington are in direct conflict on this issue at this point, although the State of Oregon does disagree with the opinion of the Washington Court of Appeals. The exclusive jurisdiction of this Court over litigation between two states serves, however, to underscore that this Court would indeed be the appropriate court to resolve the dispute if it arose in that context.

Yet a case presenting the same issue is now at hand. There is no necessity for this Court to wait until one state sues another. This Court is in a position in this case to affirm the authority of the Columbia River Gorge Commission to insist on a uniform approach to land use management under the Gorge Compact, in order to discharge effectively its stewardship responsibilities for the unique national treasure of the Columbia River Gorge National Scenic Area.

CONCLUSION

The State of Oregon urges this Court to grant *certiorari* in this case.

Respectfully submitted,

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